

FEDERAL CIRCUIT COURT OF AUSTRALIA

Harrison (Trustee) v King (a Bankrupt) (No 2) [2021] FCCA 2015

File number(s): BRG 803 of 2019

Judgment of: **JUDGE JARRETT**

Date of judgment: 26 August 2021

Catchwords: **PRACTICE AND PROCEDURE** – Setting aside judgment in default – no service

Legislation: *Federal Circuit Court Rules 2001* (Cth), r. 6.01(6), 6.06(2)(a), 16.05(2)(a)

Cases cited: *Cameron v Cole* (1944) 68 CLR 571
Taylor v Taylor (1979) 143 CLR 1

Number of paragraphs: 26

Date of last submission/s: 21 May, 2021

Date of hearing: 21 May, 2021

Place: Brisbane

Counsel for the Applicant: Ms Long

Solicitor for the Applicant: Bennett & Philp Solicitors

The First Respondent: No appearance

Counsel for the Second Respondent: Mr Russell

Solicitor for the Second Respondent: James Conomos Lawyers Pty Ltd

The Third Respondent: No appearance

ORDERS

BRG 803 of 2019

BETWEEN: **BRETT RICHARD GEOFFREY HARRISON (TRUSTEE OF
THE BANKRUPT ESTATE OF JEROME KING)**
Applicant

AND: **JEROME KING**
First Respondent

LARISA IVANOVA YUSHKOVA
Second Respondent

JEREMY DAVID ALLEN KING
Third Respondent

ORDER MADE BY: JUDGE JARRETT

DATE OF ORDER: 26 AUGUST 2021

THE COURT ORDERS THAT:

1. The judgment entered on 4 February, 2021 against the second respondent be set aside.
2. Until the determination of the proceedings as between the applicant and the second respondent or earlier order, the appointment of statutory trustees in paragraph 4 of the orders made on 4 February, 2021 be stayed.
3. By 22 September, 2021 the second respondent shall file any further affidavit material upon she intends to rely on at the hearing of the matter.
4. By 6 October, 2021 the applicant is to file and further affidavit material that he intends to rely on at the hearing of the matter.
5. By 20 October, 2021 the second respondent is to file her outline of submissions.
6. By 3 November, 2021 the applicant is to file his outline of submissions.
7. The parties costs of and incidental to the application in a case filed 24 February, 2021 be reserved to the trial judge.
8. The matter is to be listed for a review on 12 November, 2021.

REASONS FOR JUDGMENT

JUDGE JARRETT:

1 The first respondent was made bankrupt on 13 July, 2016. On 4 February, 2021 I determined
that the first respondent was the same person as the third respondent.

2 The first respondent jointly owned property with the second respondent situated at 13
Bairnsdale Court, Helensvale.

3 In the course of administering the first respondent's estate in bankruptcy, the applicant
attempted to take possession of that property and sell the first respondent's interest in it. The
first and second respondent did not cooperate with that process and as a result on 16 September,
2019 the applicant filed proceedings seeking relief against the respondents in respect of the
Helensvale property.

4 A notice of appearance was apparently filed by the second respondent on 16 December, 2019.
The notice is in these terms:

Larisa Yushkova of UI.Lenina 10–211, Perm 61400, Russian Federation, the
Respondent appears.

Address for service

The Respondent gives notice that the Respondent's address for service is:

13 Bairnsdale Court
Helensburgh
Gold Coast 4212
email: larlentino@gmail.com

5 Subsequent documents in these proceedings such as the orders made by the court and
documents given by the applicant in the course of the proceedings such as a notice to admit
facts were sent to the second respondent's address for service.

6 On 20 December, 2019 a registrar made orders for substituted service of the proceedings upon
the first respondent. The order said nothing of service of the proceedings on the second
respondent.

7 The matter came before me on 22 May, 2020 for directions. On that occasion, the solicitor
who represented the applicant informed me that both respondents had been served. There was
an appearance for the first respondent but none for the second respondent. Mr King did not
purport to appear on behalf of the second respondent.

8 I made certain directions for the filing of evidence in chief and referred the matter to mediation. A subsequent mediation was unsuccessful and on 21 August, 2020 I adjourned the application for hearing on 3 September, 2020. On 21 August, 2020 Mr King appeared but purported to appear as the third respondent not first respondent. The second respondent did not appear. The primary issue in the proceeding was whether the first respondent (Jerome King) was the same person as the third respondent (Jeremy David Allen King).

9 On 25 August, 2020 the applicant filed an interlocutory application seeking the relief that was claimed in the principal proceeding, by way of default order or summary judgment. The second respondent was served with that application on 26 August, 2020 by it being sent to the email address listed on the notice of appearance. That course was permitted by r.6.01(6) of the *Federal Circuit Court Rules 2001* (Cth). That application was heard on 3 September, 2020. The first respondent appeared by telephone and made submissions. The second respondent did not appear.

10 On 4 February, 2021 I declared that the third respondent was the same person as the first respondent and I delivered reasons for that declaration. I made the orders sought by the applicant in respect of the Helensvale property against the first and second respondents.

11 On 24 February, 2021 the second respondent, by her solicitors, filed a further notice of appearance and an application in a case in which she seeks an order that the orders made on 4 February, 2021 (in so far as they concern her and the property) be set aside. She also seeks what appears to be a readjustment of her beneficial ownership in the property as she contends that she is the beneficial owner of the property in its entirety.

12 The application is supported by two affidavits sworn by her. The first was filed on 21 April, 2021 and the second filed on 20 May, 2021. There was no request to cross-examine the second respondent or challenge the evidence given by her in those affidavits.

13 The second respondent's case is that she was never served with the proceedings. On its face, that is inconsistent with the notice of appearance in the proceedings filed on 16 December, 2019.

14 The unchallenged evidence of the second respondent is that:

- (a) she was never served with any documents in these proceedings;
- (b) she was in Russia when the proceeding was started;

- (c) she left Australia for Russia in April, 2019 and other than for a short period when she returned to Australia in January, 2020 she has been stuck in New Zealand since 30 January, 2020 largely due to COVID;
- (d) she was not aware that she was involved in any legal proceedings whatsoever, and only became aware of the judgment in this proceeding in February, 2021 or that there was a claim with respect to the Helensvale property;
- (e) the first respondent told her of the judgment;
- (f) as to the notice of appearance lodged with the Court on her behalf:
 - (i) she does not know what a notice of appearance is;
 - (ii) she never filed a notice of appearance;
 - (iii) the notice of appearance appears to have her signature on it but she does not believe she signed it; and
 - (iv) she did not sign it; and
- (g) she has never received any notification of any hearing or any hearing dates.

15 None of this evidence was challenged.

16 Further, the second respondent opposes, again without challenge that:

14. I have infrequently used the email address larlentino@gmail.com over the last several years and do not check the inbox for this email address.

15. My everyday personal email is 'valentino.australia@gmail.com'.

17 The applicant argues that the second respondent was served with the application and all of the other documents filed by the applicant on 17 January, 2020 when those documents were sent to the email address identified in the notice of appearance. Thus, it will be apparent from that argument that before the second respondent is said to have filed a notice of appearance, she had not been served with the proceedings at all. There is no explanation in either the applicant's material or the second respondent's material as to how she might have become aware of the proceedings before that was served on her so that she could file a notice of appearance.

18 The applicant argues that it follows that the applicant could, and did, prove that the second respondent was served in accordance with the Federal Circuit Court Rules. Specifically, the second respondent was served pursuant to r.6.06(2)(a) of the FCCR that provides that service by hand is not required if there are current proceedings for which there is a notice of address

for service for the person to be served. On that basis and the absence of any other matter raised by the second respondent, the default judgment order was regularly obtained.

19 The flaw in the applicant's argument, however, is that there are matters raised by the second respondent which demonstrate the judgment was not regularly obtained. Those matters set out in the first affidavit of the applicant is that she did not file the notice of appearance. She did not sign it and it is not her document. The evidence was that she did not check the inbox for the email address set out in the notice of address.

20 I do not accept the applicant's argument that notwithstanding what is now asserted by the second respondent, the judgment was regularly entered because the relevant documents were served by the applicant in accordance with the Rules.

21 This argument pays no attention to the second respondent's uncontested evidence. She was not served with the proceedings. The notice of address for service was not given by her and it was not her address for service. Whilst the applicant says that her evidence about these matters is impossible to challenge, I do not accept that that is so. If the applicant desired there to be one, a trial about those matters and cross-examination of the second respondent by reference to the notice of address for service, how it was lodged and the signature upon might have put a different complexion on the facts. But as it is, the second respondent's evidence is unchallenged. She was not served with the proceedings and the notice of address for service was not given by her.

22 Notwithstanding that the Court has power pursuant to FCCR 16.05(2)(a) to set aside a judgment or order made in the absence of a party and notwithstanding that it is not a superior court of record, the Court has an inherent jurisdiction to set aside a judgment obtained without service: *Cameron v Cole* (1944) 68 CLR 571 at 586, 589, 607 and *Taylor v Taylor* (1979) 143 CLR 1 at 8, 16.

23 The orders against the second respondent here were obtained without service of the relevant proceedings upon her. She is entitled *ex debito justitiae* to have the orders made against her set aside. The failure to give notice to the second respondent of the proceedings or any of the hearing dates was no mere irregularity but goes to the foundations of the court's power to make an order in the case. There is no evidence to suggest that notwithstanding the difficulties with the notice of appearance, the proceedings nonetheless came to the knowledge of the second respondent.

- 24 In those circumstances, it is appropriate to make the orders sought by the second respondent. Accordingly, there will be orders that the judgment entered on 4 February, 2021 against the second respondent be set aside. Until the determination of the proceedings as between the applicant and the second respondent or earlier order, the appointment of statutory trustees in paragraph 4 of the order be stayed.
- 25 The second respondent seeks costs of this application. However in my view, costs ought to be reserved to the final determination of the proceedings. It may be that matters are revealed in the course of the evidence for trial thereupon whether the applicant or the second respondent should bear the costs of this application or whether there should be no order as to costs.
- 26 It is appropriate to make further directions for the further conduct of the proceedings.

I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Jarrett.

Associate:

Dated: XX August 2021